Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

—against—

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

—against—

165 BROADWAY BUILDING, INC., and THE CITY OF NEW YORK,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions of Courts Below.

The opinion of the Special Master is printed in the record, pages 16 to 50 inclusive. The opinion of the United States District Court for the Southern District of New York confirming said report is printed at page 202 of the record. The opinion of the Circuit Court of Appeals for the Second Circuit is in the record, pages 207 to 224 inclusive (including dissenting opinion). The opinion of the Circuit Court of Appeals is reported, *165 Broadway*

Building Inc. v. *City Investing Company,* 120 F. (2d) 813 (dissenting opinion, p. 820).

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at pages 1 and 2 of the foregoing petition, and, by reference, adopted as part of this brief.

Statute Involved.

Chapter 52 of the Laws of 1909 of the State of New York (Real Property Law),

"Section 291:

"A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

Statement.

The material facts have been set forth in the Summary Statement at pages 2 and 3 of the foregoing petition, and are, by reference, adopted as part of this brief.

The Special Master, in his report (R. 16-50), confirmed by the District Court (R. 8-10), found the following:

1. That there was no privity of estate between the Railway Company and Broadway-Cortlandt Company (R. 46).

2. That under the laws and decisions of the State of New York covenants to repay sums of money such as are contained in paragraphs "Tenth" and "Eleventh" of the 1907 agreement are not covenants which touch or concern the land (R. 46).

3. That such covenants are purely affirmative and personal in character (R. 46).

4. That such personal covenants cannot be changed by the use of the general language in paragraph "Sixteenth" of the 1907 agreement into covenants running with the land (R. 48).

5. The fact that the present owner was compelled, by the demolition of the railway and the connecting link between the elevated station and the west wall of 165 Broadway to make certain repairs at its own cost, did not make the covenants in question touch or concern the land (R. 49).

6. That the petitioner acquired from Broadway-Cortlandt Company whatever rights the latter had with respect to the repayment of the sums of $10,000 and $13,557.15 (R. 43).

7. That the petitioner had the power to and did reserve to itself the right to repayment of the sums involved (R. 48-49).

8. That the respondent had constructive notice of said reservation by petitioner of the right to repayment (R. 44 and 45).

9. That the sums of $10,000 and $13,557.15 are due and payable to the petitioner and the claims of the respondent should be dismissed (R. 50).

Specifications of Error.

The Second Circuit Court of Appeals erred in each of the following respects by holding, in conflict with the controlling New York law:

(a) That the right to receive payment of the moneys in question ran with the land (R. 220);

(b) That respondent was not chargeable with notice of petitioner's reservation of right to receive the moneys in question (R. 221-222);

(c) That petitioner could not effectively reserve the right to receive payment as against subsequent grantees (R. 222);

(d) That respondent is protected as a bona fide purchaser for value and without notice under the Recording Act, and, in effect, that respondent did not have the affirmative burden of proving that it was such a purchaser for value, without notice, actual or constructive (R. 221-222);

(e) That respondent is entitled, as against petitioner, to receive repayment of the moneys in dispute (R. 223).

Argument.

The foregoing Specifications of Error are resolved, for purposes of the argument, in this brief into the three

points hereinafter set forth, each of which shows important departures by the Court below from the controlling law of the State of New York, as established by its highest court in matters involving local rules of property.

POINT I.

The decision of the Court below, holding that the right to receive payment from the railway company was not an affirmative covenant, personal in nature, but was, on the contrary, a real covenant running with the land, is in conflict with the law of the State of New York, established by its highest court.

The exact problem with which the courts below have had to deal in this case should be noted at the outset. It has nothing to do with any question as to whether the burden of a covenant runs with the land, for there was no transfer of the railway's obligations except as the City of New York eventually assumed them. The basic situation was, that under an agreement between the owner of a building and the owner of an elevated railway structure, which created certain mutual easements, the owner of the building paid to the Railway Company certain moneys, for the purpose of securing the latter from loss from expenditures made or to be made by it in connection with the easements and the Railway Company expressly covenanted to repay these moneys upon the easements terminating (six months after in case of the $10,000) (R. 181-183).

The sole question involved in this point is: Did the benefit of the covenant, that is the right to receive the moneys when repayable remain in the original covenantee (or its assigns) or pass with the lands from owner to owner thereof?

As was said in substance by the Special Master in his report (R. 46), no New York cases are to be found where such covenants to repay sums of money have been held to be covenants which touch or concern the land, but, on the contrary, they have invariably been held to be purely affirmative and personal in character.

Perhaps most closely analogous are the cases of security deposits in connection with leases. Although a lease creates an estate for years in lands and its ordinary covenants touch and concern the land and so run with it, it has been invariably held in New York that the right of the tenant to repayment of the security deposit, when repayable, is purely personal to the original depositing tenant and does not pass to subsequent tenants with the leasehold, but only by express assignment independent of the lease.

Fallert Brewing Company, Ltd. v. *Blass*, 119 App. Div. 53, 103 N. Y. S. 865;

Shattuck v. *Buck*, 158 App. Div. 709, 143 N. Y. S. 1045;

Richards v. *Browning*, 214 App. Div. 665, 212 N. Y. S. 738;

Mauro v. *Alrino*, 90 Misc. 328, 152 N. Y. S. 963 (Appellate Term, First Dept. Opinion by Lehman, *J.*, now Chief Judge of the New York Court of Appeals, cited with approval in Court of Appeals cases);

Goodale Real Estate Corp. v. *Subridge*, 139 Misc. 587, 248 N. Y. S. 663.

Another applicable line of New York cases relates to party walls.

In the first of these, *Cole* v. *Hughes*, 54 N. Y. 444, 13 Am. Rep. 611, a case many times cited and the authority

of which has never been challenged in New York, it was held, that where the owner on one side of a lot boundary erected a party wall, his right under a covenant by the adjoining owner to pay half the expense of erecting the wall when he used it was a purely personal right which passed to his assignee of such claim and not to his grantee of the land, a different person. It may be observed that this covenant to pay was, in effect, one for refund of money outlays made in connection with the erection of a building structure and with the mutual easements therein, the same as with the covenants to repay in the case at bar.

Among the New York cases in which *Cole* v. *Hughes* has been followed are:

Scott v. *McMillan*, 76 N. Y. 141;
Hart v. *Lyon*, 90 N. Y. 663;
Sebald v. *Mulholland*, 155 N. Y. 455, 50 N. E. 260 (which we shall later mention);
Crawford v. *Krollpfeiffer*, 195 N. Y. 185, 88 N. E. 29.

Hart v. *Lyon*, *supra*, like *Cole* v. *Hughes*, involved the question whether the benefit of an abutting owner's covenant to pay to the builder of a party wall one-half the cost thereof ran with the land. The covenantee (builder of the wall) lost her land by foreclosure of a mortgage thereon but assigned the benefit of the said covenant for the payment of money to the plaintiff. The Court of Appeals said that while a certain other covenant relating to the repair of the wall might be construed as running with the land, the covenant to pay one-half the cost of the wall "could not be so regarded", and the decision in favor of the plaintiff in that case was affirmed.

Also closely in point are cases of deposits made by

land developers with a public utility corporation or a municipality to obtain the installation of gas or water mains in the streets, repayable upon connection of houses with such mains. In these cases it has been held that the right to the refund is personal to the party who originally paid or deposited the money and does not run with the land. Such cases are:

Meado-Lawn Homes, Inc. v. *Westchester Lighting Co.*, 284 N. Y. 667, 30 N. E. 2d 608 (decided by the Court of Appeals in 1940 after the *Neponsit* decision and which will be hereinafter again mentioned).

Safe Deposit & Trust Co. of Baltimore v. *Baltimore-Gillett Co.*, 176 Md. 594, 12 Atl. 2d 208 (urged on the New York Court of Appeals in the said *Meado-Lawn Homes* case).

The foregoing cases of covenants to refund moneys in connection with lease deposits, party wall construction expenses and public utility mains are the cases which set forth the New York Law applicable to the case at bar.

Indeed, a right to the "refund" or "repayment" of moneys is something which, by the very meaning of the words, implies repayment to the particular person who originally made the payment (or his assigns of the chose in action). Refund means to pay back, thus implying that payment is to be made to the party from whom the fund was received.

Matter of Auditore, 278 N. Y. 234, 235, 15 N. E. 2d 593 (decided the same day as the *Neponsit* case with an opinion by the same judge);

City of Grand Rapids v. *Iosco Land Co.*, 273 Mich. 613, 263 N. W. 753;

3 Bouv. Law Dict. (Rawles 3rd Ed.) 2856.

Now the Circuit Court of Appeals has reversed the District Court in the case at bar upon the supposition that the applicable law of New York was changed by the Court of Appeals in 1938 by its decision in *Neponsit P. O. Assn.* v. *Emigrant Ind. Sav. Bk.*, 278 N. Y. 248, 15 N. E. 2d 793. The opinion of the majority of the Circuit Court of Appeals, in effect, admits that until the *Neponsit* decision, the New York courts invariably held that the right to receive money under a covenant to repay or refund money was a personal right, not running with the land. Thus, it is said in said majority opinion (R. 216):

> "It may be conceded that prior to the *Neponsit* case, the general attitude of the New York cases has been one of hostility to running covenants."

Again said opinion after dealing with the *Neponsit* case refers to "clear progress from authoritarianism to pragmatism" (R. 218) clearly implying such change by the *Neponsit* decision.

The question therefore is: Has the Court of Appeals made any such change in the New York law, and if so, does such change touch situations involving merely the right to receive refunds of money, such as in this case?

The majority of the Circuit Court of Appeals in holding, in effect, that the New York law has thus been changed by the *Neponsit* case has, we submit, misapprehended the effect of that decision. The *Neponsit* decision has been discussed quite fully upon the application of the petitioner to the Circuit Court of Appeals for a rehearing (R. 227-236). Briefly, that case related solely to the running of the burden of a covenant uniformly imposed in its deeds by the Neponsit Realty Company, the common grantor in a high class residential park development. By this covenant each grantee agreed, for himself, his heirs, successors and assigns, to make annual payments to the

grantor, or its assigns, towards the expense of the upkeep of the streets, parks, beaches, etc. in which all grantees and subsequent owners of the lots granted, had easements of common enjoyment, and such annual amounts, as they came due, were made liens on the lots. The plaintiff was a property owners association, provided for in the covenant itself, to which the Neponsit Realty Company had assigned all right to receive such annual payments. The defendant in that case, a subsequent grantee of one of the lots whose title was expressly subject to the said covenant, invoked the general rule that the burden of covenants to do affirmative acts, particularly to pay money, does not run with the land, but the Court of Appeals held against said defendant.

Exceptions to said general rule have always been recognized both in England and New York, such as covenants to repair fences on boundary lines, to repair private ways and certain covenants in leases, as appears in many New York decisions, particularly *Miller* v. *Clary*, 210 N. Y. 127, 132, 103 N. E. 1114, and *Guaranty Trust Co.* v. *N. Y. & Q. Co. Ry. Co.*, 253 N. Y. 190, 204, 170 N. E. 887. And when the *Neponsit* decision is analyzed, it will be seen that it constitutes merely one additional exception to that general rule. Said exception, in substance, is, that in such type of cases as the *Neponsit* case, in connection with residential developments, the very desirability of which would be destroyed if the streets, parks and beaches were not properly kept up, covenants of owners of lots to contribute to such upkeep necessarily run with the land.

The necessity for such an additional exception to said general rule had, earlier than the *Neponsit* decision, been recognized by the New York Appellate Division in *Lawrence Park Realty Co.* v. *Crichton*, 218 App. Div. 374, 218 N. Y. S. 278.

The Circuit Court of Appeals has apparently construed isolated statements in the *Neponsit* opinion, as indicating that said state court by that decision departed from the ancient rule of both English and New York law. Clearly, such conclusion was erroneous. This appears both by the comparatively recent decisions of the same court to which it referred and to which it gave emphatic endorsement in the *Neponsit* opinion, particularly *Miller* v. *Clary*, 210 N. Y. 127, 103 N. E. 1114; *Guaranty Trust Co.* v. *N. Y. & Q. Co. Ry. Co.*, 253 N. Y. 190, 170 N. E. 887, and *Morgan Lake* v. *N. Y., N. H. & H. R. R. Co.*, 262 N. Y. 234, 186 N. E. 685, and by the subsequent decision which we have mentioned, namely, the *Meado-Lawn Homes* case, 284 N. Y. 667, 30 N. E. 2d 608.

Reading these opinions and the references of the Court of Appeals in the *Neponsit* opinion to the prior ones, we clearly see that, instead of making any change in the general rule of New York that covenants to do affirmative acts and particularly to pay money are personal covenants, the court has reaffirmed that rule. And the *Neponsit* opinion shows that it was only with great hesitation and much labor that the Court of Appeals reached the conclusion that a new exception to the general rule should be recognized covering cases of covenants to contribute to the upkeep of common beneficial facilities in residential parks.

To refer briefly to said prior decisions:

In *Miller* v. *Clary*, 210 N. Y. 127, referred to on page 256 of the Neponsit opinion, it was held that a covenant by a grantor of mill property to construct and maintain a shaft, was an illustration of the general rule as to covenants to do affirmative or positive acts and did not run with the land.

In *Guaranty Trust Co.* v. *N. Y. & Q. Co. Ry. Co.*, 253 N. Y. 190, quoted on pages 256-257 of said *Neponsit* opinion, the Court held that a sweeping covenant, including after-acquired personal property in the coverage of a mortgage, did not reach or include a power house, car barn and street railway equipment acquired after the mortgage by a corporation which was a successor by merger to the mortgagor corporation.

And in *Morgan Lake Co.* v. *N. Y., N. H. & H. R. R. Co.*, 262 N. Y. 234, referred to on page 258 of said *Neponsit* opinion, involving a covenant by a railroad company, predecessor to the defendant company, to pay for damages caused by sparks, coal dust, etc., to the ice in a lake abutting the railroad, although Judge Crane thought that the situation was analogous to the anciently recognized exceptions to the general rule, as his own opinion indicates, other members of the Court did not share that view and the decision for the plaintiff was based solely upon the ground that the defendant corporation had assumed all the obligations of the predecessor, including the said covenant, the same as though it had been the original covenantor.

Each of the three last mentioned Court of Appeals cases dealt with a more difficult branch of the general rule than that involved in the case at bar, namely, the running of the burden of covenants to do affirmative acts and they did not involve rights to the benefits of such covenants. The approval by the Court of these cases shows that it did not intend to change the law even as to the running of the burden of such covenants.

That the Court of Appeals was not concerned in the *Neponsit* case with questions of the running of benefits is indicated by the fact that it did not mention the case of *Cashin* v. *City of New Rochelle*, 256 N. Y. 190, 176 N. E. 138, a case involving the running of the benefit of a

covenant to do an affirmative act where it was held that a successor owner—though of the same family—could not enforce a promise made in the original agreement granting a right of way for construction and maintenance of a sewer that "fences and grounds disturbed or removed by said parties * * * for any of the purposes aforesaid shall be restored to the same condition as found by" such parties.

The whole idea of the majority of the Circuit Court of Appeals that the New York Court of Appeals has changed the New York law by progressing "from authoritarianism to pragmatism" (R. 218) is based upon the language of Judge Lehman in the *Neponsit* decision approving the looking to the substantial effect of a covenant upon the legal relations of the parties as owners of the land rather than to mere form (*Neponsit* Opinion, p. 258), but Judge Lehman immediately goes on to say:

> "Perhaps the most illuminating illustration of such an approach to the problem may be drawn from the 'party wall' cases in this State which are reviewed in the opinion of the Court in *Sebald* v. *Mulholland*, 155 N. Y. 455."

The Court of Appeals thus indicated that in the *Neponsit* opinion it was not even suggesting a new method of approach to the problem, but merely following the method of approach in *Sebald* v. *Mulholland* and the other party wall cases, which included *Cole* v. *Hughes*, 54 N. Y. 444, and *Hart* v. *Lyon*, 90 N. Y. 663. There was, then, really nothing new in principle about the *Neponsit* decision, but only the recognition of a new exception to the general rule having not the remotest bearing upon the case at bar. And the fact that in the *Neponsit* case the Court of Appeals followed the method of approach of the party wall cases which, as we have shown, related to

the refund of money outlays, particularly makes it clear that the Court of Appeals had not the slightest idea that it was making any change in the law affecting the benefit of covenants to refund money.

This is strikingly established by the disposition by the Court of Appeals of the next case involving the running of covenants which came before it.

This was the case we have already mentioned of, namely, *Meado-Lawn Homes Inc.* v. *Westchester Lighting Co.*, 284 N. Y. 667, where the Court of Appeals, after granting the plaintiff a review by it, affirmed, although without opinion, the decisions of the Special Term and of the Appellate Division of the New York Supreme Court. The decision of the Special Term is reported at 171 Misc. 669, 13 N. Y. S. 2d 709. A full discussion of that case is contained in pages 228-233 of the record, having been embodied in our petition for a rehearing submitted to the Circuit Court of Appeals. The facts were, briefly, that deposits had been made by the defendant Bi-State Development Corporation, a land owner developing a residential tract, with the defendant Westchester Lighting Company to cover the cost of installing gas mains in the streets, and the Lighting Company covenanted to "refund" a stated amount of such deposits for each house erected, as and when connected with such gas mains.

The covenantee, the Development Corporation, conveyed practically all of the land remaining in 1937 to the plaintiff, which erected houses thereon, connected them with the gas mains and sued the defendant Lighting Company for the agreed refund, making the Development Corporation a party, and the latter claimed the refunds. The plaintiff in that case was thus much in the position of the respondent in the case at bar. But the Special Term held that the covenant to refund was personal only and that the moneys were to be refunded only to the

Development Corporation, the original covenantee, corresponding to the assignor of the petitioner herein, which was affirmed by the Appellate Division without opinion (259 App. Div. 810, 20 N. Y. S. 2d 396).

In that case the brief of the plaintiff in the Court of Appeals emphasized the *Neponsit* decision and asserted in effect that the position of the defendant Development Corporation amounted to an unwarranted narrowing of the *Neponsit* holding (R. 231), but the Court of Appeals disagreed with that contention and affirmed. It thus completely repudiated the theory of the majority of the Circuit Court of Appeals that under the *Neponsit* case the right of a covenantee to receive money to be refunded, in a situation like the case at bar, could be a right which ran with the land.

The Circuit Court of Appeals in its majority opinion in the case at bar cited the *Meado-Lawn Homes* case in 171 Misc. 669, as an example of the "hesitation—still true in the lower courts (of New York) even after the *Neponsit* case" in enforcing promises to pay money as running encumbrances and mentioned in a footnote the affirmance by the Court of Appeals in the *Meado-Lawn Homes* case (there cited as 284 N. Y. *99) (R. 217-218). But it seems to have wholly overlooked the fact that the *Meado-Lawn Homes* case is the latest decision of the Court of Appeals on the subject, rendered on facts closely analogous to those of the case at bar, and is decisive of the issues in this case, irrespective of the *Neponsit* decision.

The ultimate reason which seems to be assigned by the Circuit Court of Appeals for the reversal is that, upon the supposed warrant of the *Neponsit* case to apply pragmatic tests to the facts, it finds that

> "It was unreal to consider these refunds as a windfall payment for the benefit of persons having no

> present interest in the land rather than as a component part of a rather carefully thought out plan of land utilization" (R. 219).

It, in effect, finds that the provisions for refunds were intended to take the place of a covenant by the railway company to pay the expense of restoring the building in case of discontinuance of its connection with the elevated railway station (R. 219). Such finding of intent, we submit, is based on a mere surmise and not on anything in the agreement of 1907 which justifies such an inference.

No issue as to the intent of the parties to said agreement with reference to the refunding covenants was litigated or even suggested before the Special Master nor in the exceptions filed to the Master's Report. This situation was called to the attention of the Court below in our petition for rehearing, and it was then explained that had any such issue arisen at the trial, a witness for City Investing Company who participated in the drawing of said agreement of 1907 would have been available to testify upon any question of intent (R. 236).

It does appear by the record that in 1914, upon the conveyance of the building from the original owner and covenantee, Broadway-Cortlandt Company, a subsidiary of City Investing Company, to the latter under a formal contract of sale, the said parties treated the right to the $10,000 refund as a mere chose in action, transferred by mere entries upon the books of both corporations and a thing which did not require any mention in the deed as a realty matter (R. 158-167). This practical construction of the agreement of 1907 by the original owner and its parent grantee of the right to receive back the moneys as one not passing with the land, coming only seven years after the original contract, is entitled to great weight. The omission of City Investing Company to pay its said grantor by book credit anything for the right to

refund of the construction costs ($13,557.15) is of no significance because in 1914 no one could have contemplated the demolition of the elevated railway; while, on the other hand, the discontinuance at some time thereafter of the connection between the railway and the building and consequent release of the $10,000 deposit for ticket chopper expense was not at all unlikely. And both of the claimants to this refund, petitioner and the respondent herein, upon the trial before the Special Master, claimed the $10,000 as a trust fund held by the Railway Company (R. 34) although the Railway Company denied the trust feature and succeeded upon that one issue. This idea of a trust fund, asserted by both the instant parties, was, we submit, consistent only with the view that the right to recover the $10,000 was a chose in action, and not something which followed the land from one owner to another.

Great stress is laid by the majority of the Circuit Court of Appeals upon the intent of the parties with respect to the 1907 agreement. It is a general rule of law that parties to contracts are, in the absence of any overwhelming evidence to the contrary, presumed to make their contracts in accordance with existing rules of law. At all times down to at least the *Neponsit* decision in 1938, as is admitted by said opinion, the New York law was strongly to the effect that agreements to do affirmative acts, including the payment of money, were purely personal covenants and could not run with the land even though the parties may have desired the contrary. The cases of *Cole* v. *Hughes*, 54 N. Y. 444; *Hart* v. *Lyon*, 90 N. Y. 663, and *Sebald* v. *Mulholland*, 155 N. Y. 455, 50 N. E. 260 (1898), had laid down the rule, particularly as to the benefit of covenants to pay money, prior to the 1907 contract. The case of *Crawford* v. *Krollpfeiffer*, 195 N. Y. 185, 88 N. E. 29, had applied this rule in the

year 1909. The case of *Miller* v. *Clary*, 210 N. Y. 127, 103 N. E. 1114, had in 1913—one year prior to the assignment of the chose in action by Broadway-Cortlandt Company to petitioner—again reaffirmed this rule. In 1930 the *Guaranty Trust Co.* case, 253 N. Y. 190, 170 N. E. 887, and in 1933 the *Morgan Lake Co.* case, 262 N. Y. 234, 186 N. E. 685—both subsequent to the 1926 deed and mortgage involved in Point II following—had again reiterated the rule. Accordingly, there was at no time during the period involved any doctrine recognized by the Court of Appeals justifying the inference that the parties here in question intended—as the Circuit Court of Appeals has proclaimed—that the covenants to repay moneys should run with the land as a part of a plan for the development of the land.

POINT II.

The decision of the lower Court is in conflict with the law of the State of New York, as established by its highest court, that respondent was chargeable with notice of the complete and effective reservation by petitioner of all rights to receive repayment of the moneys from the Railway Company.

In order to sustain its decision it was necessary for the court below to dispose of the question of actual or constructive notice as a bar to respondent's claim.

This means that the court below has held, contrary to the Special Master, that the respondent was not chargeable with either actual or constructive notice, despite the proof presented to the Special Master to the effect that

(a) Petitioner expressly reserved its rights in the contract of sale of 1919 (R. 44);

(b) The deed, recorded on the same date as the mortgage through which respondent derives title, recites that such owner and mortgagor had acquired the premises "subject to * * * unrecorded agreements affecting said real estate * * *" (R. 44);

(c) The recorded agreement consolidating the mortgages through which respondent derives title expressly limited the rights of the mortgagee by the phrase

> "Subject, however, * * * to agreements relating to maintenance of elevated station * * *" (R. 193).

The use of the plural "agreements" indicates, necessarily, an agreement other than the original agreement of 1907; and

(d) That Grigori Benenson, the same individual who executed with petitioner the contract of 1919 in which petitioner's right to receive payment of the moneys in question was expressly reserved, was also the President of Benenson Building Corporation, which executed the mortgage and consolidation agreement through which respondent derives title,

and despite the absence of any proof by respondent affirmatively showing that it had acquired the premises in question without notice, actual or constructive, of petitioner's prior rights.

Upon such state of the record it was incumbent upon the court below to follow the holding of the Special Master and of the District Court, and to apply the New York law with respect to the question of notice, actual or constructive, as invalidating the rights of a subsequent grantee under the recording act (New York Real Property Law, Sec. 291), in this case the respondent. The New York law as to notice is a long established rule of property in that State, as laid down by its highest court, and

repeatedly affirmed. In *Sweet* v. *Henry*, 175 N. Y. 268 (1903) at page 276, 67 N. E. 574, the New York Court of Appeals stated the rule as follows:

> "The rule of law is well settled that a recital in a deed forming a link in the chain of title of any facts which should put a subsequent grantee or mortgagee upon inquiry and to cause him to examine other matter by which a defect in the title would be disclosed, is constructive notice of such defect.
>
> Where a purchaser of land has knowledge of any facts sufficient to put him on inquiry as to the existence of some right or some title in conflict with that which he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser."

The rule of *Sweet* v. *Henry, supra*, is of ancient origin in the State of New York and is still the law of that State. It is recognized in the following decisions prior to *Sweet* v. *Henry*.

> *Williamson* v. *Brown*, 15 N. Y. 354;
> *Acer* v. *Westcott*, 46 N. Y. 384, 7 Am. Rep. 355;
> *McPherson* v. *Rollins*, 107 N. Y. 316, 14 N. E. 411;
> *Anderson* v. *Blood*, 152 N. Y. 285, 46 N. E. 493.

This rule has been repeatedly referred to in decisions of the New York courts since the decision in *Sweet* v. *Henry, supra*, as appears from the following cases:

> *Green* v. *Horn*, 207 N. Y. 489, 495, 101 N. E. 430;
> *Tuscarora Club* v. *Brown*, 215 N. Y. 543, 547, 109 N. E. 597;
> *McKenna* v. *Brooklyn Union Elev. Ry. Co.*, 95 App. Div. 226, 231, 88 N. Y. S. 762; rev'd on other grounds, 184 N. Y. 391, 77 N. E. 615;

Ebling Brewing Co. v. *Gennaro*, 189 App. Div. 782, 786, 179 N. Y. S. 384;

Barber v. *Rowe*, 200 App. Div. 290, 297, 193 N. Y. S. 157, aff'd 235 N. Y. 549, 139 N. E. 730;

BelleAyre Conservation Co. v. *State of New York*, 214 App. Div. 127, 132, 211 N. Y. S. 641; aff'd 264 N. Y. 593, 159 N. E. 665, cert. den. 277 U. S. 591, 72 L. Ed. 1003.

See also application of this rule in summary proceedings affecting a portion of the very premises in question, in *165 Broadway Realty Co. Inc.* v. *Weber & Heilbroner*, 143 Misc. 672, 256 N. Y. S. 805, aff'd without opinion 238 App. Div. 837, 263 N. Y. S. 935.

It thus appears that the rule of *Sweet* v. *Henry, supra*, is so much an established rule of property in the State of New York that conveyancers must be considered to act with reference thereto and that proper application of the rule in this case would require an affirmance of the order of the District Court in favor of petitioner.

As a subsidiary ground, which would not by itself entitle petitioner to review, it is pointed out that the decision of the Circuit Court of Appeals in this case is contrary to the rule of constructive notice, as enunciated not only by that Court but by the U. S. Supreme Court in the following cases:

The Tompkins, 13 Fed. (2d) 552; C. C. A. 2nd (1926);

Simmons Creek Coal Co. v. *Doran*, 142 U. S. 417, 35 L. Ed. 1063;

Stanley v. *Schwalby*, 162 U. S. 255, 40 L. Ed. 960.

The Circuit Court of Appeals has also held (R. 222) that under the law of the State of New York the right of

petitioner to the moneys in question could not be effectively reserved on the ground that a running covenant may not be turned into one in gross without the consent of the servient owner. Such conclusion results from misconception by the Circuit Court of the New York law in the following respects:

Obviously, if the court below had properly applied the New York law so as to hold that the covenant in question, being personal, did not run with the land and could, therefore, be reserved or assigned without reference to the land, as argued under Point I, the question of the effect of the reservation would not need to be decided, as the New York law on that point alone would resolve the decision in favor of petitioner.

However, the court below, after erroneously holding that the right to receive the money in question ran with the land, held petitioner's reservation ineffective through misapplication of the New York law, as stated in the cited case of *McKenna* v. *Brooklyn Union Elev. R. R. Co.*, 184 N. Y. 391, 77 N. E. 615, and related cases (R. 222). That case holds that easements of light, air and access, being appurtenant to real property, are inseparable from the dominant estate and the right to damages for invasion or destruction thereof cannot be effectively reserved upon a grant of the fee. Such cases can have no application to the situation here involved, namely, the right to receive a sum of money subsequent to the time when all connection between the elevated railway and the building had been completely terminated, so that absolutely no question of separability of easements or of rights thereunder is involved.

Moreover, bearing in mind the fact that the right of the Railway Company to receive payment is not here involved (R. 212), and that both parties claiming the funds are before the equity court, and that the Railway Com-

pany is willing to pay the funds to the party determined to be entitled thereto, we find that the New York law establishes petitioner's right to the moneys even though the covenant ran with the land and even though it could be said to involve separability of easements from the fee. Thus, in *Drucker* v. *Manhattan Railway Co.*, 213 N. Y. 543, 108 N. E. 74, the New York Court of Appeals has held that where the railroad was obliged, as here, either by agreement or by adjudication, to pay the person entitled thereto, the prior owner who has expressly reserved the right to such payment, as against a subsequent grantee having notice or chargeable with notice of such reservation, is entitled to receive payment on the basis of the equitable principles set forth in that case.

To the same effect see:

Western Union Tel. Co. v. *Shepard*, 169 N. Y. 170, 62 N. E. 154;

Schomacker v. *Michaels*, 189 N. Y. 61, 81 N. E. 555;

McKenna v. *Brooklyn Union Elev. Ry. Co.*, 184 N. Y. 391, 77 N. E. 615;

Pegram v. *Elevated Railroad Co.*, 147 N. Y. 135, 41 N. E. 424;

Dunlop v. *Sweet Bros. Paper Mfg. Co. Inc.*, 211 App. Div. 363, 208 N. Y. S. 54;

Freund v. *Biel*, 114 App. Div. 400, 99 N. Y. S. 1067, affd. 193 N. Y. 662, 87 N. E. 1119;

Trustees of Mission Church v. *Ridley*, 167 App. Div. 392, 396, 152 N. Y. S. 745;

Matter of City of New York (*Man. R. Co.*), 126 Misc. 879, 902, 216 N. Y. S. 2, mod. other grounds 229 App. Div. 617, 243 N. Y. S. 665, affd. 295 U. S. 264, 79 L. Ed. 1429, approved 265 N. Y. 170, 192 N. E. 188.

The case of *Maurer* v. *Friedman*, 197 N. Y. 248, 90 N. E. 814, in which the subsequent grantee was held entitled to payment, is not in point here as the decision turned upon the express provision in the recorded instrument to the effect that the reservation should "not be construed in any manner as a lien or encumbrance or binding or affecting said demised premises", and consequently was not intended as a reservation binding remote grantees.

POINT III.

The decision of the lower Court is also in conflict with the long standing rule of law in New York State, as established by its highest court, that a subsequent grantee, in order to rely upon the protection of the Recording Act, must sustain the affirmative burden of proving that he is a purchaser in good faith and without notice.

The Circuit Court of Appeals has held (R. 221-222) that 165 Broadway Building, Inc. had neither actual nor constructive notice of petitioner's reservation of right to receive payment of the funds in dispute. The Special Master in his report, based upon the evidence before him, found (R. 44-45) that inquiry by 165 Broadway Building, Inc. would have disclosed petitioner's reservation and that petitioner had effectively reserved the right to receive payment of the funds in dispute (R. 49). There is no finding or proof or offer of proof to the effect that 165 Broadway Building, Inc. has sustained the affirmative burden of showing that it was a bona fide purchaser without notice. Under such circumstances the decision of the Circuit Court of Appeals is in conflict with the rule laid down by the New York State courts to the effect that a subsequent purchaser relying on the recording act must affirmatively plead and show

that he is a bona fide purchaser without notice of prior rights of others, even under unrecorded instruments.

In *Flickinger* v. *Glass*, 222 N. Y. 404, 118 N. E. 792, involving the question as to superiority of a vendee's lien over the rights of a subsequent mortgagee, Judge Cardozo said at page 410:

> "Even though there was no fraud the mortgage yields to the lien unless it was taken without notice, actual or constructive, of the rights of the vendee; and the burden of proof is with the defendants to show that notice was lacking."

In *Hood* v. *Webster*, 271 N. Y. 57, 59, 2 N. E. (2d) 43, the New York Court of Appeals said:

> "We think this question of burden of proof as fixed by the recording act is not for us an open one. The defendants were bound to make out, by a fair preponderance of the evidence, the affirmative assertion of their status as purchasers in good faith and for a valuable consideration. *Westbrook* v. *Gleason*, 79 N. Y. 23; *Ten Eyck* v. *Witbeck*, 135 N. Y. 40; 31 N. E. 994; 31 Am. St. Rep. 809; *Lehrenkrauss* v. *Bonnell*, 199 N. Y. 240, 243; 92 N. E. 637."

That this has been the rule in New York State from the very earliest times down to the present is shown by the following:

Gallatian v. *Cunningham*, 8 Cowen 361, at page 374;
Denning v. *Smith*, 3 Johns Ch. 332;
Murray v. *Ballou*, 1 Johns Ch. 566, at 575;
Simpson v. *Del Hoyo*, 94 N. Y. 189 at 194;
Seymour v. *McKinstry*, 106 N. Y. 230, 240, 12 N. E. 348, 14 N. E. 94;

Ochenkowski v. *Dunaj*, 232 App. Div. 441, 443 *et seq.*, 251 N. Y. S. 589.

Conclusion.

The principles of New York Law discussed in the preceding points, involving as they do local rules of property affecting titles to real estate and conveyancing practice in the State of New York, it is submitted that the failure of the court below to apply the law of the State of New York in the determination of the issues here involved will tend to create great confusion in the law and in titles to property situated in New York State, and that such important considerations justify the granting of petitioner's application for a writ of certiorari.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the said decision of the Second Circuit Court of Appeals.

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